BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

GRISELDA HERNANDEZ DE ESPINO Claimant	)	
V.	)	
NATIONAL BEEF PACKING COMPANY Respondent	)	Docket No. 1,059,654
AND	)	
ZURICH AMERICAN INSURANCE CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the August 20, 2015, Award entered by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on January 7, 2016. Stanley R. Ausemus of Emporia, Kansas, appeared for claimant. Shirla R. McQueen of Liberal, Kansas, appeared for respondent and its insurance carrier.

The ALJ found claimant sustained an 11 percent permanent partial disability to the body as a whole as a result of the January 3, 2012, work-related injury to her low back. The ALJ determined claimant was terminated for cause, and therefore not entitled to temporary total disability (TTD) benefits or work disability following February 23, 2012. The ALJ granted claimant unauthorized medical and future medical treatment upon proper application.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant argues she is entitled to a 16 percent functional impairment to the body as a whole. Moreover, claimant contends she was not terminated for cause and is therefore entitled to a work disability award.

Respondent maintains the ALJ's Award should be affirmed. Respondent argues claimant was terminated for cause and not eligible for an award of work disability.

Respondent argues claimant is entitled to compensation based only on her functional impairment, and she is not permanently totally disabled.

The issues for the Board's review are:

1. Was claimant terminated for cause?

2. What is the extent of claimant's functional impairment?

FINDINGS OF FACT

Claimant began working for respondent on June 27, 2011. As part of the hiring process, she attended an interview with respondent's Employment Director, Lupe Lopez, at which she told Ms. Lopez she had suffered an injury to her elbow while working for Texas Farms in 2005.[1] Ms. Lopez wrote in her interview notes that claimant hurt her arm while at Texas Farms.[2]

Claimant was given a job offer and directed to complete a Medical History Questionnaire. Claimant has very limited knowledge of English but is fluent in Spanish. The questionnaire was written in both English and Spanish and stated twice that any falsification or omission of information may lead to termination. Claimant signed the questionnaire on June 7, 2011. Claimant testified she hurried through the questionnaire and did not read the statement about falsifying/omitting information.

Claimant did not acknowledge her prior work-related injury or workers compensation claim in the questionnaire. Claimant received medical treatment and accommodated work as the result of her elbow injury at Texas Farms, but the elbow injury was not permanent and she did not receive a settlement. She testified she did not recall denying the prior elbow injury or compensation claim on the form. Claimant said, "It's just that I didn't understand what that was."[3]

After completing the questionnaire, claimant underwent a physical examination, again a part of respondent's hiring process. The examiner did not have any documentation available aside from the medical questionnaire completed by claimant. Claimant testified she told the examiner about the incident with Texas Farms. Claimant also reported on the questionnaire a history of unrelated health problems, and respondent required a release

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[1] Regular Hearing at 23-24.

[2] Hall Depo., Ex. 1 at 5.

[3] Claimant's Depo. at 21.

from a physician showing claimant was capable of working. Once claimant obtained the release, she attended orientation and was put to work.

On January 3, 2012, claimant sustained an injury to her back when lifting a stool. Claimant reported the incident to her foreman and was provided medical treatment. Claimant ultimately underwent surgery to her low back. Following surgery, claimant was treated with medication and physical therapy. Claimant testified the surgery was not successful, and she has constant pain affecting her daily activities.

Selena Sena, respondent's workers compensation coordinator, testified she found discrepancies in claimant's file while making copies for litigation. Ms. Sena noticed claimant reported a prior work injury during her employment interview, but did not report the same on the Medical History Questionnaire. Ms. Sena stated if respondent had been aware of a prior injury, it would have requested either a medical release or permanent restrictions related to the treatment claimant received at Texas Farms. The examining physician did not testify. There is no documentation of claimant's prior work injury other than in the notes of the employment director, which are not maintained in claimant's medical file. Any information related to the initial interview was not available at the time of the physical examination.

George Hall, respondent's human resources director, testified claimant underwent two interviews once the Texas Farms injury was revealed. Claimant was eventually terminated on February 23, 2012, for falsifying and/or omitting information on her Medical History Questionnaire. Mr. Hall testified:

> [Claimant] indicates in her interview statement in personnel that she was nervous when she filled out the Medical History Questionnaire because she had been turned down one other time for employment. And I take that as an indication that her failure to indicate that was a knowing attempt at falsification.[4]

Claimant continued to receive medical care following her termination. Claimant was paid TTD benefits from January 13, 2012, through July 23, 2012. Claimant received fringe benefits until her termination.

Dr. Terrance Pratt examined claimant on October 11, 2012, at respondent's request. Claimant complained of continuous burning to sharp symptoms in her left low back with radiation into the left foot with numbness and burning. Dr. Pratt reviewed claimant's medical records, history, and conducted a physical examination. He noted claimant had generalized guarding with her movements, which he considered an overreaction or inappropriate response. Dr. Pratt testified he was unable to determine claimant's true functional abilities due to her self-limiting, give-away weakness, and lack of participation

[4] Hall Depo. at 17.

in motor evaluation. Regardless, Dr. Pratt said, "I was able to determine permanency within the limitations of the examination."[5] Dr. Pratt determined claimant had chronic low back pain with a history of degenerative disc disease, was status post left L4-5 procedure, and had a history of anxiety and depression.

Using the AMA *Guides*,[6] Dr. Pratt found claimant sustained a 10 percent permanent partial impairment to the whole person. He explained:

> [R]ange of motion model could not be utilized to help differentiate. She had degenerative changes and disc abnormalities identified with a lumbosacral procedure. At this stage with the significant limitations on the examination, I really could not assess range of motion, could not assess motor function, and sensory function loss was not in a dermatomal distribution. I could only consider her to have DRE category III involvement or 10% permanent partial impairment of the whole person in relationship to her reported vocationally-related activities and the need for the procedure. As outlined, the degenerative changes were pre-existing.
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> Work restrictions, I would recommended [*sic*] that she not perform frequent low back bending or twisting, not lift in excess of 20 pounds, push or pull in excess of 30 pounds. I do not feel that she is a good candidate for a functional capacity evaluation.[7]

Dr. Pratt stated claimant should undergo a psychiatric evaluation before he recommended any additional treatment.

Dr. C. Reiff Brown examined claimant on September 12, 2013, at claimant's counsel's request. Claimant complained of constant low back and hip pain worsened with activity. Dr. Brown noted claimant exhibited pathology in her low back consistent with her work-related surgery, and she remained highly symptomatic. He opined claimant was unemployable from a practical standpoint.

Dr. Brown testified he employed the Range of Motion method of calculating claimant's impairment due to the fact she was highly symptomatic. He explained a higher percentage was warranted than could be obtained with the DRE method of calculation. Using the AMA *Guides*, Dr. Brown determined:

> [Claimant] is place[d] in the IIE [*sic*] with a 10% permanent partial impairment of function of the body as a whole. Tables 81 and 82 on Pages 128 and 130 allow her

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[5] Pratt Depo. at 11.

[6] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[7] Pratt Depo., Ex. 2 at 5.

> an additional 7% whole body impairment based on loss of range of motion. These combine to total 16% permanent partial impairment of function of the body as a whole, the result of the January 3, 2012 injury.
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> . . .
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> Permanent work restrictions include inability to lift in anyway other than with her arms with elbows adjacent to the trunk. No flexion or rotation of the lumbar spine is allowed. She should sit constantly while working. She should alternately be allowed to stand and move about the immediate area. Pushing and pulling should be limited to 10 pounds and she must remain seated for this activity.[8]

Dr. Brown testified he did not have Dr. Pratt's report available for review. He did not believe claimant was self-limiting because of the results of his testing and found claimant's responses to be appropriate. Dr. Brown recommended claimant receive treatment at a multi-specialty pain clinic regardless of her status of maximum medical improvement (MMI).

Dr. Vito Carabetta, a court-ordered physician, examined claimant for independent medical evaluation (IME) purposes on March 27, 2014. Claimant complained of persistent low back pain, worse on the left, and radiating symptoms in her lower left extremity to her foot, worsened with activity. Dr. Carabetta reviewed claimant's history, medical records, and performed a physical examination. He testified claimant had some evidence of symptom magnification, but this did not detract from the fact she suffered a significant back injury. Further, Dr. Carabetta stated claimant exhibited objective muscle spasm during the physical examination. He testified he did not believe claimant was consciously malingering, but rather exhibiting learned pain behavior. Dr. Carabetta agreed claimant was at MMI, but would require additional pain control for her failed back surgery.

Dr. Carabetta testified the Range of Motion method of the AMA *Guides* would be inaccurate in this case. Using the DRE method, he opined:

> As [claimant] has had evidence of lumbar radiculopathy for which surgical intervention was pursued, and Table 72 on page 110 is referenced, we find a presentation consistent with a Category III situation. By definition, this is the equivalent of a 10% whole person impairment. However, at the time of her surgery, it appears that there was an additional level of surgical intervention. Therefore, as we apply Table 72, an additional 1% whole person impairment would appear appropriate. This brings the total to 11% whole person impairment.[9]

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[8] Brown Depo., Ex. 1 at 2.

[9] Carabetta Depo., Ex. 2 at 4.

Dr. Carabetta recommended the following permanent restrictions:

> Maximum lifting or carrying even on an occasional basis should be no more than 10 pounds. More frequent lifting or carrying activities should only be with negligible weight. She should not do any bending or stooping activities.[10]

Vocational rehabilitation counselor Doug Lindahl initially interviewed claimant via telephone, with an interpreter, at claimant's counsel's request. Together they generated a list of all tasks claimant performed in the five years preceding her work accident. Mr. Lindahl later interviewed claimant to add an additional task she performed while at respondent, as listed in his report of September 13, 2014. He noted claimant could not speak English, was in her mid 40s, and had no vocational training. Claimant's education consisted of school through the 9th grade in Mexico. Mr. Lindahl considered claimant's history, education, and age in formulating his opinions, as well as the restrictions imposed by Drs. Pratt, Brown, and Carabetta. Based on Dr. Pratt's restrictions, claimant could perform her previous job at respondent and would suffer no wage loss. Based on Dr. Brown's restrictions, Mr. Lindahl opined claimant would be unable to enter the open labor market. Based on Dr. Carabetta's restrictions, Mr. Lindahl indicated claimant could perform sedentary work, but there was very little chance she would return to work; therefore, she had a 100 percent loss of earning capacity. If claimant were accommodated, she could perform her prior job at respondent based on Dr. Carabetta's testimony and would suffer no wage loss.

Dr. Pratt reviewed the list of nine unduplicated tasks identified by Mr. Lindahl. Dr. Pratt stated claimant could perform at least six of the tasks, and possibly seven depending on the weight limit for Task No. 3. If claimant could no longer perform three tasks, she sustained a 33 percent task loss. If claimant could no longer perform two tasks, she sustained a 22.3 percent task loss.

Dr. Brown reviewed the task list generated by Mr. Lindahl. Of the nine tasks on the list, Dr. Brown concluded claimant could no longer perform any, for a 100 percent task loss.

Dr. Carabetta also reviewed the list prepared by Mr. Lindahl. Dr. Carabetta indicated claimant could perform two of the tasks on the list assuming she was accommodated to stand and sit as needed. If claimant could perform those two tasks, she sustained a 78 percent task loss.

Karen Terrill, vocational consultant, interviewed claimant by telephone, with the assistance of an interpreter, at respondent's request and generated a report dated February 10, 2015. The parties agreed Ms. Terrill's task list would be used only to determine wage capability and not presented to the physicians for a task loss opinion.

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[10] *Id*.

Ms. Terrill reported claimant's educational history, noting claimant could understand some English and read the front of a newspaper. Claimant was fluent in Spanish and could perform basic math. Ms. Terrill opined claimant could return to work in the open labor market and, therefore, was not permanently totally disabled. She indicated claimant's wages would vary depending on which restrictions were considered.

Ms. Terrill reviewed the labor market in the regions of both Liberal, Kansas, and Perryton, Texas, where claimant resides. She stated she was conservative in evaluating positions considered light duty or below, even though Dr. Pratt's restrictions place claimant in a light/medium category. Under Dr. Pratt's restrictions, claimant could be a fast food cook or a dishwasher. In Kansas, claimant would sustain a 52 percent wage loss for each position. In Texas, claimant would sustain a 50 percent wage loss as a fast food cook and a 49 percent wage loss as a dishwasher.

Both Drs. Brown and Carabetta placed claimant at a sedentary level, and Ms. Terrill determined claimant could be an inspector or a sewing machine operator with these restrictions. A sedentary inspector position would earn at least the federal minimum wage, causing a 57 percent wage loss regardless of location. Claimant would sustain a 43 percent wage loss as a sewing machine operator in Kansas, or a 36 percent wage loss in Texas. Ms. Terrill testified claimant would have no wage loss if she could return to her position at respondent. Ms. Sena testified claimant's position would have been accommodated if she had not been terminated for cause.

Claimant testified at the regular hearing she did not feel she was able to return to work in her condition. In a Stipulation filed July 22, 2015, claimant reported she began employment on June 2, 2015, earning $9.00 per hour, 40 hours per week.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b(c) states claimant has the burden to establish the right to an award of compensation and to prove the conditions on which that right depends. "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[11]

K.S.A. 2011 Supp. 44-510e(a)(2), in part, states:

> (B) The extent of permanent partial general disability shall be the percentage of functional impairment the employee sustained on account of the injury as established by competent medical evidence and based on the fourth edition of the

[11]K.S.A. 2011 Supp. 44-508(h).

American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

(C) An employee may be eligible to receive permanent partial general disability compensation in excess of the percentage of functional impairment ("work disability") if:

(i) The percentage of functional impairment determined to be caused solely by the injury exceeds 7½% to the body as a whole or the overall functional impairment is equal to or exceeds 10% to the body as a whole in cases where there is preexisting functional impairment; and

(ii) the employee sustained a post-injury wage loss, as defined in subsection (a)(2)(E) of K.S.A. 44-510e, and amendments thereto, of at least 10% which is directly attributable to the work injury and not to other causes or factors.

In such cases, the extent of work disability is determined by averaging together the percentage of post-injury task loss demonstrated by the employee to be caused by the injury and the percentage of post-injury wage loss demonstrated by the employee to be caused by the injury.

(D) "Task loss" shall mean the percentage to which the employee, in the opinion of a licensed physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the five-year period preceding the injury. The permanent restrictions imposed by a licensed physician as a result of the work injury shall be used to determine those work tasks which the employee has lost the ability to perform. If the employee has preexisting permanent restrictions, any work tasks which the employee would have been deemed to have lost the ability to perform, had a task loss analysis been completed prior to the injury at issue, shall be excluded for the purposes of calculating the task loss which is directly attributable to the current injury.

(E) "Wage loss" shall mean the difference between the average weekly wage the employee was earning at the time of the injury and the average weekly wage the employee is capable of earning after the injury. The capability of a worker to earn post-injury wages shall be established based upon a consideration of all factors, including, but not limited to, the injured worker's age, physical capabilities, education and training, prior experience, and availability of jobs in the open labor market. The administrative law judge shall impute an appropriate post-injury average weekly wage based on such factors. Where the employee is engaged in post-injury employment for wages, there shall be a rebuttable presumption that the average weekly wage an injured worker is actually earning constitutes the post-injury average weekly wage that the employee is capable of earning. The presumption may be overcome by competent evidence.

(i) To establish post-injury wage loss, the employee must have the legal capacity to enter into a valid contract of employment. Wage loss caused by voluntary

> resignation or termination for cause shall in no way be construed to be caused by the injury.
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> . . .
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> (iii) The injured worker's refusal of accommodated employment within the worker's medical restrictions as established by the authorized treating physician and at a wage equal to 90% or more of the pre-injury average weekly wage shall result in a rebuttable presumption of no wage loss.

ANALYSIS

The ALJ held that claimant was terminated for cause. The Board disagrees. Claimant was allegedly terminated for falsifying and/or omitting information on the medical history questionnaire she completed when she applied for employment with respondent. Prior to completing the questionnaire, in her job interview, claimant told Ms. Lopez about the elbow injury she suffered while working at Texas Farms. Ms. Lopez confirmed in the interview notes that claimant told her about the injury. Claimant also testified she told the doctor conducting the post-employment offer physical examination about her prior elbow injury. Claimant's testimony in this regard is uncontroverted. Respondent knew about claimant's previous work-related injury prior to her hiring and prior to asking claimant to complete the health questionnaire.

In *Morales-Chavarin v. Nat'l Beef Packing Co.*,[12] the Court of Appeals reviewed the standard of proving termination for cause, stating:

> . . . the proper inquiry to make when examining whether good cause existed for a termination in a workers compensation case is whether the termination was reasonable, given all of the circumstances. Included within these circumstances to consider would be whether the claimant made a good faith effort to maintain his or her employment. Whether the employer exercised good faith would also be a consideration. In that regard, the primary focus should be to determine whether the employer's reason for termination is actually a subterfuge to avoid work disability payments.[13]

In *Morales*, the Court of Appeals found the employer did not show that it acted in good faith.[14] The same is true in this instance. Respondent terminated claimant for not disclosing a fact in writing that she had previously disclosed to them orally. The oral

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[12] *Morales-Chavarin v. Nat'l Beef Packing Co.*, No. 95,261, 139 P.3d 153 (Kansas Court of Appeals unpublished opinion filed August 4, 2006).

[13] *Id.* at 5.

[14] *Id.* at 7.

disclosure was recorded, in writing, in the interview record maintained by respondent. Given all of the circumstances, it seems unreasonable to terminate claimant for not disclosing a prior workers compensation injury on a form when she had, in fact, disclosed the prior injury during her interview.

Claimant asks the Board to find claimant suffers a 16 percent functional impairment to the body as a whole, based upon the impairment rating provided by Dr. Brown. The ALJ adopted the opinion of the court-ordered independent medical evaluator to arrive at her finding claimant suffers an 11 percent impairment to whole person. In *Tatro v. Southwest Medical Center*,[15] the Board wrote:

> The opinion of the court-appointed physician should not be blindly adopted in all instances. The statute merely requires that the opinion of the court-appointed physician be considered. The court-appointed physician should, on the other hand, be free from any bias. Where the opinions of the court-appointed physician appear otherwise consistent with the nature of the injury or injuries and appear to properly apply the AMA *Guides to the Evaluation of Permanent Impairment*, it is reasonable to adopt the opinions of the court-appointed physician.[16]

The Board agrees with the ALJ's adoption of Dr. Carabetta's impairment rating. Based upon all the medical evidence, the Board finds Dr. Carabetta's rating to be reasonable.

CONCLUSION

Claimant was not terminated for cause. The wage loss exclusion contained in K.S.A. 2011 Supp. 44-510e(a)(2)(E)(i) does not apply.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated August 20, 2015, is reversed and remanded for a determination of TTD, wage loss, task loss, work disability and other issues not addressed in this Order.

IT IS SO ORDERED.

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[15] *Tatro v. Southwest Medical Center*, No. 208,331, 2000 WL 1134426 (Kan. WCAB July 28, 2000).

[16] *Id.* at 2.

Dated this _____ day of February, 2016.

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BOARD MEMBER

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Hon. Pamela J. Fuller, Administrative Law Judge